No. 03-587

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WANDA M. BRYANT,

Petitioner,

v.

AIKEN REGIONAL MEDICAL CENTERS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT L. WIDENER
Counsel of Record
RICHARD J. MORGAN
MCNAIR LAW FIRM, P.A.
Attorneys for Respondent
1301 Gervais Street
Columbia, SC 29211
(803) 799-9800

184863

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether this Court should exercise its discretion to review the decision of the Fourth Circuit when there is no split in the Circuits with regard to the application of this Court's *Kolstad* decision and standards set forth therein.

Whether this Court should exercise its discretion to review the Fourth Circuit's decision that, as a matter of law, Respondent met the good faith defense standards set forth in *Kolstad*.

Whether this Court should exercise its discretion to review the fact-specific decision that Petitioner's failure to dispute Respondent's nondiscrimination efforts allows it to now argue a new theory of "alter ego" not properly raised or preserved below.

Whether this Court should exercise its discretion to review the decision of the Fourth Circuit when there is no split in the Circuits with regard to the tax enhancement issue.

Whether this Court should exercise its discretion to review the decision of the Fourth Circuit when the issue is not preserved for appeal.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Aiken Regional Medical Centers, Inc., is owned by a subsidiary of Universal Health Services, Inc., which is publicly traded.

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STATEMENT OF THE CASE

This race discrimination case arises from a dispute between Petitioner and Respondent over the failure to promote/hire Petitioner. The case went to the jury on three claims, and the jury found for Petitioner on two claims, to-wit: that the Respondent (Hospital) improperly refused to hire Petitioner as a registered nurse and that the Hospital had retaliated against her. The jury awarded actual and punitive damages.

The trial court denied the Hospital's motion to strike the punitive damages award. The trial court also denied the Petitioner's motion for a "tax enhancement" of her back-pay award. Both parties appealed. The Fourth Circuit affirmed the trial court in all respects except to reverse the award of punitive damages against the Hospital.

The Hospital hired Petitioner in April 1994 as a technician in its Central Services Department. During her employment, from the Fall of 1996 through the Fall of 1998, Petitioner simultaneously attended the University of South Carolina-Aiken to pursue a nursing degree. The Hospital paid approximately $5,000.00 of her tuition to assist her in receiving that degree.

During January 1999, prior to the receipt of her nursing license, Petitioner asked the Hospital's Human Resources Director whether she was free to seek employment at other hospitals, or whether she must continue working for the Hospital based on a tuition contract. The Human Resources Director told her to discuss registered nurse opportunities with the Hospital's Director of Nursing. The Human Resources Director investigated the contract matter and

determined there was no binding tuition agreement between the parties, because there was no signed agreement. He told Petitioner she was free to seek employment with other hospitals. It is undisputed Petitioner did not mention any race discrimination to the Human Resources Director at this or any other time.

On February 8, 1999, Petitioner submitted her two-week notice of resignation, effective February 22, 1999.[1] She had accepted a nursing position with another hospital based on applications that she had submitted prior to her resignation. She did not mention race discrimination, retaliation, or any other employment problem in her letter of resignation. She observed "I appreciate the experiences and knowledge I gained as an employee in Central Services and wish you a successful future." A note in Petitioner's personnel file stated she was eligible for rehire after her voluntary resignation.

The Hospital's Equal Employment Opportunity Policy stated in pertinent part:

> It is and shall continue to be the policy of Aiken Regional Medical Centers that all persons are entitled to equal employment opportunity regardless of race . . .
>
> In compliance with the provisions of all applicable State and Federal civil rights laws, every effort will be made to employ the most qualified individuals without regard to the above factors. Additionally, it is and shall continue to be our

1. Since there was no tuition agreement, the Hospital did not seek reimbursement of its tuition payments when Petitioner voluntarily resigned on February 8, 1999.

> policy to provide promotion and advancement opportunities in a non-discriminatory fashion.
>
> . . .

It is undisputed that this was the Hospital's Policy throughout Petitioner's employment. It is undisputed that the Hospital advised all employees of this Policy in its employee handbook, policy manual, and job applications. The Hospital trained its employees on the requirements of the Policy and informed all employees that it would not retaliate against them for complaining about or grieving any employee relations issues, such as dissatisfaction, harassment, or discrimination.

The Hospital's Policy encouraged employees to report discrimination to the "Director of Human Resources or the Hospital Administrator." Petitioner never did this. The Hospital's "Problem Solving Procedure" encouraged employees to discuss problems with the "Department Head or Administration" and/or the "immediate supervisor" or the "supervisor's manager." Petitioner never did this.

In furtherance of its Policy, the Hospital implemented a "diversity or race relations program" to develop diversity training classes and exercises to re-train and re-educate employees, even though the Hospital did not perceive diversity and/or race relations to be a problem. In addition, the Hospital voluntarily monitored its hiring practices and termination records to determine whether "anomalies" existed in "departmental demographics."

Petitioner discussed the Hospital's hiring practices with three people: (1) Thomas Kelly, an African-American who

served in a non-managerial role as Service Excellence Coordinator; (2) Ron Park, the Surgical Educator; and (3) Sandy Garcia, the Surgical Services Director.[2] Petitioner admitted Mr. Kelly was not a manager and had no hiring or promotion authority. Mr. Park likewise was not a manager and had no hiring authority. There is no evidence that Petitioner complained of race discrimination to Mr. Park or Ms. Garcia. Petitioner admitted she never specifically raised the race discrimination issue with any manager.

In short, the only evidence of any race-based complaint was that Petitioner complained to Mr. Kelly, but it is undisputed he had no managerial or hiring authority. There is no evidence whatsoever that any decision maker or manager was aware of Petitioner's race discrimination complaint to Mr. Kelly, or of any race-based concern she might have had.

During the time period that Petitioner sought a nursing position, the Hospital hired four nurses. Two of the nurses were African-American females and one was otherwise similarly situated to Petitioner, to-wit: she was a current employee enrolled in the same nursing school and receiving tuition aid from the Hospital. The undisputed evidence was that these four nurses were hired between the date Petitioner received her license and her effective date of resignation. The undisputed evidence also shows that the Hospital had a history of hiring African American nurses both during and after Petitioner's employment.

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2. Petitioner never discussed available nursing positions with Ms. Garcia, and Ms. Garcia was unaware that Petitioner had applied for a nursing position.

SUMMARY OF THE ARGUMENTS

The Punitive Damages Issue: The Fourth Circuit's decision raises no constitutional issue nor does it create a split among the circuits. The trial court conducted a *de novo* review of the punitive damages issue, and the Fourth Circuit reviewed the trial court's ruling. The Fourth Circuit did not substitute its own view of the evidence for that of the jury. Instead the Fourth Circuit properly reviewed the trial court's *de novo* analysis under the standards set forth in *Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

Petitioner asks this Court to adopt a bright line test for punitive damages when the Supreme Court in *Kolstad* has indicated there should be none. Like the Fourth Circuit, the other Circuit Courts have universally applied the *Kolstad* standards for punitive damages to the facts before them, requiring proof that "the employer has engaged in intentional discrimination and has done so with malice or with reckless indifference to the federally protected rights of an aggrieved individual" but further noting that an employer is not liable for punitive damages if the discriminatory actions of managerial agents were contrary to the employer's "good faith efforts to comply with Title VII." *Kolstad*, 527 U.S. at 545.

Petitioner's "alter ego" theory of liability under *Kolstad* is raised for the first time in the petition to this Court and, therefore, is not properly preserved for review. It is also without merit, because it seeks a bright line test based on job title without consideration of the employer's undisputed organizational good faith efforts to comply with Title VII.

The Tax Enhancment Issue: The Fourth Circuit's decision does not create a split in the circuits; Petitioner's position is based on opinions from district courts. The tax enhancement argument also does not create any constitutional issue. Moreover, any such issue is not properly preserved for review, because it was not timely and properly raised to the district court at trial.

I. THIS COURT SHOULD DENY CERTIORARI ON THE PUNITIVE DAMAGES ISSUE.

A. *The Fourth Circuit properly applied Kolstad.*

This Court in *Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999), articulated the following standard for punitive damages:

> The statute's 'primary objective' is a 'prophylactic one; it aims chiefly, 'not to provide redress but to avoid harm.'
>
> . . .
>
> In light of the perverse incentives that the Reinstatement's 'scope of employment' rules create, we are compelled to modify these principles to avoid undermining the objectives underlying Title VII . . . Recognizing Title VII as an effort to promote prevention as well as remediation and observing the very principles underlying the Reinstatements' strict limits on vicarious liability for punitive damages, we agree that, *in the punitive damages context*, an employer may not be vicariously liable for the discriminatory decisions of managerial agents

> where the decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'

Kolstad at 545 (emphasis added) (citations omitted).

Here, the Fourth Circuit carefully noted that it was reviewing "the trial judge's decision" and the trial court's independent judgment rather than the jury's determination.

The Fourth Circuit's opinion is consistent with, not contrary to or opposite, other Circuits' review of punitive damages awards. *Fitzgerald v. Mountain States Telephone and Telegraph Co.*, 68 F.3d 1257, 1262 (10th Cir. 1995) (whether sufficient evidence exists to support punitive damages is a question of law); *Romano v. U-Haul Int'l*, 233 F.3d 655, 673 (1st Cir. 2000) (reviewing court engaged in determining or making an excessiveness inquiry should accord 'substantial deference to the legislative judgments concerning appropriate sanctions for the conduct at issue); *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376, 385 (2d Cir. 2001) (Kolstad good faith defenses discussed in terms of "as a matter of law"); *Hall v. Consolidated Freightways Corp.*, 337 F.3d 669 (6th Cir. 2003) (addresses whether issue of punitive damages was properly submitted to the jury, not the appellate court's review of the trial judge's *de novo* review of the punitive damages issue); *Lampley v. Onyx Acceptance Corp.*, 340 F.3d 478 (7th Cir. 2003) (no discussion of an Appeal court's review of a trial court's *de novo* review of punitive damages); *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000) (discusses company's efforts "as a matter of law" applying the *Kolstad* standards); *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001) (due process challenge to the punitive damages award reviewed under *de novo* standard).

The Fourth Circuit noted, consistent with the trial court's analysis, that the Hospital had created and implemented the following policies or procedures:

1. an extensively implemented, organization-wide Equal Employment Opportunity Policy;

2. inclusion of the policy in the widely distributed employee handbook, setting forth the prohibition of race discrimination to include non-discrimination in promotions;

3. creation of a grievance procedure encouraging employees to submit claims of harassment, discrimination, or general dissatisfaction;

4. explicitly informing employees there would be no retaliation for making a complaint;

5. adoption of a carefully developed diversity training program that included formal training classes and group training exercises for hospital employees; and

6. voluntarily monitoring department demographics to keep the employee base reflective of the pool of potential employees in the area.

The Hospital's implementation of these policies is best seen in the hiring of employees similarly situated to Petitioner at the time she complains of racial discrimination and other hiring patterns at the Hospital. Other than inferences and Petitioner's "gut" feel that there was discrimination, there is

no evidence in the record to counter each of these substantial organizational efforts to provide equal employment opportunities in the workplace. In fact, there was no evidence – corroborating witness, smoking gun document, or any document – to challenge, contradict, or otherwise suggest that the Hospital's non-discrimination efforts were anything other than in good faith and implemented by its managers including the Human Resources Director. Thus, consistent with the "good faith" defense announced by this Court in *Kolstad*, the Fourth Circuit reversed the award of punitive damages.

B. *Petitioner's "alter ego" argument is not preserved and has no merit.*

To overcome the Fourth Circuit's "good faith" ruling, Petitioner argues the so-called "alter ego" exception to the defense. Petitioner did not make this argument to the Fourth Circuit; she raises it for the first time in the petition to this Court. Thus, it is not properly before this Court for review and affords no basis for certiorari. Moreover, it is without merit.

Petitioner confuses inferences from evidence with evidence that is undisputed. Both the District Court and the Fourth Circuit identified many efforts the Hospital undertook to notify employees and thereafter insure equal employment opportunities in the workplace. As the Fourth Circuit noted in its Order, Petitioner did not dispute these widespread nondiscrimination efforts. The undisputed evidence further reveals that the Human Resource Director implemented several of these nondiscrimination programs. In addition, at no time was the Human Resource Director directly or

indirectly informed of Petitioner's discrimination claims. Finally, as implemented, the organizational nondiscrimination programs and/or policies resulted in the hiring of African Americans. Said another way the organization's efforts achieved the "prophylactic" objective of the statute.

II. THE COURT SHOULD DENY CERTIORARI ON THE TAX ENHANCEMENT ISSUE.

A. *This issue is not properly before this Court.*

Petitioner never raised this issue before or during trial. She raised it for the first time in an oral motion after the jury's verdict, followed by a written motion with an attached expert affidavit. This was an untimely and cavalier disregard for the provisions of the scheduling order, especially with respect to the timelines for identifying experts. It also deprived the Hospital of any opportunity to depose or cross-examine Petitioner's expert and to engage its own expert to refute or counter Petitioner's expert. In short, this issue is not properly preserved for appeal and, therefore, affords no basis for certiorari.

B. *The Fourth Circuit properly affirmed the trial court's denial of a tax enhancement.*

The Fourth Circuit correctly denied Petitioner's request for a tax enhancement, as courts do not compensate a plaintiff for any tax consequences that she might suffer as a result of an award in a typical, non-class discrimination case. *See Sears v. The Atchison, Topeka & Santa Fe Ry., Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984) (allowing a tax component in a back pay award for a class of plaintiffs covering a seventeen year period but noting that a "tax component may not be

appropriate in a typical Title VII case.") (citing *Blim v. Western Elec. Co.*, 731 F.2d 1473, 1480 (10th Cir. 1984) for the proposition that a tax component was inappropriate in an age discrimination case); *Gelof v. Papineau*, 829 F.2d 452 (3d Cir. 1987) (vacating and remanding tax enhancement award); *see generally Curl v. Reavis*, 608 F. Supp. 1265, 1269 (W.D.N.C. 1985) (noting that the "Plaintiff's tax liability is a matter between the Plaintiff and the respective taxing authority.").

Title VII adopted its "make-whole back pay," remedial scheme from the National Labor Relations Act at the time of its enactment in 1964. Thirty-nine years after the passage of Title VII, no Circuit Court has affirmed or decided in an individual treatment case that back pay should be afforded tax enhancement as part of the relief granted. The Fourth Circuit, therefore, properly decided the issue and no review is merited.

C. *The Fourth Circuit's decision does not create a split in Circuits on the questions of a tax enhancement award.*

There can be no split in the Circuits on the question of a tax enhancement award when no Circuit has affirmed or issued an opinion awarding this relief in a disparate treatment case. *Blim v. Western Elec. Co.*, 731 F.2d 1473, 1480 (10th Cir. 1984) (tax component was inappropriate in an age discrimination case); *Sears v. The Atchison, Topeka & Santa Fe Ry.*, 749 F.2d 1451, 1456 (10th Cir. 1984) (tax component likely inappropriate in a typical Title VII case, but did award in a class action case covering seventeen years); *Gelof v. Papineau*, 829 F.2d 452 (3d Cir. 1987) (vacates and

remands tax enhancement award). The Fourth Circuit was, therefore, consistent in its refusal to award tax enhancement in this disparate treatment case, and properly affirmed the District Court's decision denying the enhancement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. WIDENER
Counsel of Record
RICHARD J. MORGAN
MCNAIR LAW FIRM, P.A.
Attorneys for Respondent
1301 Gervais Street
Columbia, SC 29211
(803) 799-9800